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IN THE

Supreme Court of the United States

October Term 1973
Nos. 73-1377, 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK;
CITY OF DETROIT, Party Plaintiff, *Respondents.*

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

CAMPAIGN CLEAN WATER, INC., *Respondent.*

Brief of the California Attorney General as Amicus Curiae in Support of Respondents' Position That Petitioner Illegally Reduced Allotments to States as Required to Be Made by the Federal Water Pollution Control Act Amendments of 1972

EVELLE J. YOUNGER,
Attorney General of the State of California,
ROBERT H. O'BRIEN,
Senior Assistant Attorney General,
NICHOLAS C. YOST,
Deputy Attorney General,
600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-3085,
Attorneys for the People of the State of California as Amicus Curiae in Support of Respondents.

Of Counsel:
JAN E. CHATTEN.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Introduction

"There presently exists a 'wait and see' mood on the part of State and local governments. . . . This stagnant condition will be compounded by the uncertainty that will be bred by a Presidential disagreement with Congress over the content and direction of the Federal program. More important-

ly, it will counter the President's demand that we 'not slacken our pace, but accelerate it.'

"We will be confronted by the inequity of trying to pursue, through enforcement means a control program against industrial dischargers, while failing to fund municipal plants on the same stream, and not controlling those industrial wastes discharged through municipal plants. As the President stated, 'A river cannot be polluted on its left bank and clear on its right. In a given waterway, abating some of the pollution is often little better than doing nothing at all, and money spent on such partial efforts is often largely wasted.' [Footnote omitted.]

"Finally, we can anticipate many groups questioning the degree of Federal commitment and interest, and the Federal Government's ability to provide stable and effective leadership. The momentum of awareness and action will not be sustained and the attainment of the President's goal of 'true quality of life in America' will be hindered. . . . Program delay and indecision have become common. As the President said, 'as we strive to expand our national effort, we must also keep in mind the greater cost of not pressing ahead.' [Footnotes omitted.]

". . . .

"EPA is not unmindful of the limited resources that the Federal Government can apply to its important programs. It is a constraint that fades many hopes. . . .

"But countervailing this concern are the consequences of failure to meet our national need in this area. *More so than any other, water is our*

most important national resource. It sustains our industry, our farms, our commerce, our enjoyment, our lives. It is also most unforgiving if it is abused. The effects linger and, if continued, multiply.

"It seems reasonable to me to spend less than 1% of the Federal budget and two tenths of 1% of the Gross National Product over the next several years to assure for future generations the very survival of the Gross National Product." Letter from William Ruckelshaus to The Office of Management and Budget, October 11, 1972, recommending Presidential Approval of the Federal Water Pollution Control Act Amendments of 1972, "A Legislative History of the Water Pollution Control Act Amendments of 1972," Public Works Committee, 93rd Cong., 1st Sess., Serial No. 93-1 (1973). (Emphasis added.)

Despite the strong and eloquent recommendation of the President's own appointee as Administrator of the Environmental Protection Agency, the President vetoed the Federal Water Pollution Control Act Amendments of 1972 (hereinafter FWPCA). Congress, however, expressing a strong sense of commitment to cleaning the nation's waters, overrode the President's veto.

The decision to spend $18 billion for waste treatment plants was not an easy one for Congress. It was a carefully weighed decision, with much thought given to the potential inflationary effect on the economy. The cost of cleaning our waters is great. It was determined, however, that in terms of destroying all hope of saving the quality of our waters, a weak commitment on the part of the federal government would have even a greater cost.

Ultimately, our national priorities must be established by the People, speaking through their legislative representatives. Congress has spoken. It is now up to the courts to effectuate that decision so that the task of cleaning our nation's waters may begin.

Statement of the Case

The facts out of which this case arises are aptly summarized by District Court Judge Merhege in *Campaign Clean Water v. Ruckelshaus.* (TT. Appendix pp. 80A, 81A.)

It is significant to note that since the reduction of allotments, five out of six District Court judges who have ruled upon the issue of the amount of allotments made under the FWPCA have ruled in favor of plaintiffs:

City of New York v. Ruckelshaus, ... F.2d .... (D.C. Cir.), 358 F. Supp. 669 (D. D.C. 1973), 5 ERC 1305;

Anthony R. Martin-Trigona v. William D. Ruckelshaus, ... F. Supp. .... (N.D. Ill. 1973), Civil Action No. 72-C03944, 5 ERC 1665, summary judgment entered in favor of plaintiff finding act of allotment ministerial;

Campaign Clean Water, Inc. v. Ruckelshaus, 489 F.2d 492 (4th Cir. 1973), 361 F. Supp. 689 (E.D. Va. 1973), 5 ERC 1441, plaintiff's motion for summary judgment granted finding discretion in making allotments but holding discretion abused; Court of Appeals remanded with directions to take evidence on abuse of discretion;

George E. Brown, Jr. v. Ruckelshaus, and *City of Los Angeles v. Ruckelshaus,* 364 F. Supp.

258 (C.D. Cal. 1973), 5 ERC 1803 (1973), motion to dismiss on standing issue granted (Judge Hauk also addressed the merits and sustained the "impoundment");

State of Minnesota v. United States Environmental Protection Agency, et al., D. Minn., No. 4-73 Civ. 133, 5 ERC 1586 (1973), plaintiff's motion for summary judgment granted; appeal pending;

State of Maine, et al. v. Robert W. Fri, et al., D. Maine, Civil Action No. 14-51, the District Court entered a preliminary injunction requiring allotment of funds; the Court of Appeals for the First Circuit affirmed (.... F. 2d ...., 5 ERC 1991 [1973]).

The Issue

At the beginning it should be made clear that we do not view the case before us as one involving an impoundment of funds. It is actually a far more serious case.[1] When funds are impounded they are retained and may accumulate for later use. By not making the initial allotments to the states the federal commitment has been cut back and without additional legislation those funds will never be made available to the states.

A complicated funding procedure was set forth in the FWPCA. The six-step procedure is aptly set forth

[1]The Court of Appeals for the District of Columbia Circuit, while ruling as California urged as a friend of the court that the allotment of funds was a purely ministerial act, refused to pursue what it considered the "semantic argument" we presented as to the distinction created by the unique funding mechanism. *New York v. Train*, Combined Appendix pp. 7A, 8A. The distinction between flexibility at the obligation stage and a refusal to make full allotments is not, however, a semantic distinction but has a substantive effect.

by the Court of Appeals for the District of Columbia in *New York v. Train.* (Appendix p. 6A.) The first step is really a bookkeeping procedure. The Administrator, according to standards of a state's need as set forth in the Act, each year allots amongst the states the amount of money which will eventually be made available to them. Though no money changes hands at this stage, the states then can rely on eventually obtaining a fixed share of the federal funds for the program.

The issue, then, before this Court is whether the allotment to the states of the funds authorized to be appropriated is a ministerial act. This has been treated as the central issue in every case involving the reduction of allotment except *Campaign Clean Water, Inc. v. Train.* The failure of plaintiffs in the *Campaign Clean Water* case to fully address this issue renders the opinions in that case of little value. The crucial error made by plaintiffs in *Campaign Clean Water* was in incorrectly conceding that Congress intended to give the executive certain discretion in making allotments. It is that concession with which we do not concur and which skews the result in the Fourth Circuit's decision.

Statement of Interest

Imposed upon the states by the FWPCA are certain specific duties in regard to waste treatment. Section 301(b)(1)(B) requires publicly owned treatment plants within certain time periods to meet effluent limitations based on secondary treatment. By July 1, 1983,

all publicly owned treatment plants are required by section 301(b)(2)(B) to provide for the "best practicable" waste treatment technology. A tremendous amount of money will have to be expended by California to comply with these congressional mandates.

One of the four national policies stated in the Act is the "national policy that federal financial assistance be provided to construct publicly owned waste treatment works." § 101(a)(4). It was the intent of Congress in enacting Title II of the FWPCA to assist states in development of the waste treatment management plants necessary to achieve the water quality goals of the Act. That was why $18 billion was authorized by Congress to be appropriated as grants for construction of waste treatment plants.

By the Administrator's refusal to allot the full amount of funds authorized to be appropriated, California stands to lose a total of $948,300,000 in construction grants for 1973, 1974 and 1975, California's share of the federal allotment being 9.8176%. 37 Fed. Reg. 6282 (Dec. 8, 1972); 38 Fed. Reg. 5331 (Feb. 28, 1973); 39 Fed. Reg. 5257 (Feb. 11, 1974). Without those funds the citizens of California, in order to meet the standards established by the Act, will have to bear a substantial economic burden which Congress intended the federal government to share.

The Attorney General is the chief law officer of the State of California. (Cal. Const. art. V, § 13.) He has been delegated by the California Legislature the

responsibility of providing the people of the State of California with an adequate remedy to protect the natural resources of the State of California from pollution, impairment or destruction. (Cal. Gov. Code § 12600(b).)

To protect the waters of the State of California and insure compliance with the FWPCA and our own State Water Quality Act (Cal. Wat. Code § 13000 *et seq.*), it is in the best interest of the public for the California Attorney General to support the position of the City of New York in order to secure allotment of the full amount of funds authorized by Congress in the FWPCA.

Summary of Position

It is the position of the State of California that:

1. These cases present a justiciable controversy which is not barred by the doctrine of sovereign immunity;

2. The President only has such powers to refuse to allot or spend funds as is express or implied in the authorizing legislation;

3. Section 205(a) of the FWPCA states that sums authorized to be appropriated *shall* be allotted. The history of sections 205(a) and 207 of the FWPCA demonstrates the congressional intent that all funds authorized for appropriation for waste treatment plants be allotted to the states. Allotment of funds, according to a formula based on need for waste treatment plants, is a ministerial act;

4. Under the funding procedure established by the FWPCA it is at the subsequent obligation stage that the Administrator has some discretion as to when funds will be spent. Once funds have been allotted, however, they will eventually be spent as they are carried over from year to year;

5. If it is concluded that the Administrator does in fact have some discretion as to the amount allotted, he has abused that discretion in allotting only some 55% of the funds authorized for appropriation in 1972 and 1973;

6. To allow the reduction of the allotment to stand would frustrate the will of Congress and violate the constitutional doctrine of separation of powers.

ARGUMENT

I

This Case Presents a Justiciable Controversy Which Is Not Barred by the Doctrine of Sovereign Immunity

In all of the litigation arising out of the reduction of allotments under the Federal Water Pollution Control Act, the Administrator has contended that the facts fail to present a justiciable case or controversy and involves a non-justiciable political question. Furthermore the Administrator contended, as he now contends, that this case is barred by the doctrine of sovereign immunity. Several of the judges in the cases below have treated the contentions of the Administrator on this point at length and concluded that this case presents a justiciable controversy which is not barred by the doctrine of sovereign immunity. Even Judge Hauk, the only District Court judge who ruled in favor of the Administrator, held that although this may be a political case it is not a political question and therefore is justiciable. *Brown v. Ruckelshaus*, 364 F. Supp. 258, 262-63 (C.D. Cal. 1973), 5 ERC 1803, 1805. This certainly is no more of a political case than the first major impoundment case, *Kendall v. United States*, 37 U.S. 524 (1838). As stated in *Baker v. Carr*, 369 U.S. 186, 211 (1962):

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. . . ."

Just such a matter is presented in this case. For a good summary of the role played by the judiciary in the question of impoundment of funds see *Presidential Impounding of Funds: The Judicial Response*, 40 U. Chi. L. Rev. 328 (1973).

Petitioner contends that this suit is barred by the doctrine of sovereign immunity because the requested relief will lead to the expenditure of government funds. Petitioner relies upon *Dugan v. Rank*, 372 U.S. 609 (1963). What petitioner fails to realize is this case is within the exception to the general rule stated in *Dugan v. Rank*. In that case the Court indicated that a suit could be brought against a United States officer when the action challenged allegedly exceeded the officer's statutory authority, or if within the scope of authority was premised upon a power which is unconstitutional. *Dugan v. Rank, supra*, at 621.

Furthermore as stated in *Martin-Trigona v. Ruckelshaus*, ... F. Supp. .... (N.D. Ill. 1973), 5 ERC 1665, 1666:

> "It should be noted at the outset that the relief sought by the plaintiff does not require the expenditure of unappropriated public funds nor does it require the obligation of appropriated funds. The plaintiff is not seeking a determination of whether or not the Administrator is required to spend a given amount of money for his sewage treatment. Rather plaintiff is seeking a judicial declaration that would require the Administrator to perform what plaintiff alleges to be a purely ministerial duty under the Act. (Viz. that of allotting—and thus making *available* for obligation—

> the sums authorized to be appropriated by Sec. 207 of the Act.)" (Emphasis in original.)

Also supporting the decision that this claim is not barred by the doctrine of sovereign immunity is a very important impoundment case: *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

It is clear that this case presents a justiciable controversy which is not barred by the doctrine of sovereign immunity. We, therefore, proceed to examine the merits of the proposition that the Administrator does not have the discretion to reduce allotments of funds authorized to be appropriated for construction of waste treatment plants.

II

The Legislative History of Sections 205(a) and 207 of the Act Indicates Congressional Intent That All Funds Be Allotted, Though Flexibility Was Given the Administrator Concerning What Is Actually Spent in Any One Year

Section 207 of the FWPCA established the maximum funds authorized to be appropriated for 1973, 1974, and 1975.

> "There is *authorized to be appropriated* to carry out this title . . . for the fiscal year ending June 30, 1973, *not to exceed* $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000." (Emphasis added.)

Section 205(a) of the Act mandates that funds authorized to be appropriated under section 207 be

allotted among the states by the Administrator prior to January 1, immediately preceding the fiscal year in which it is to be appropriated.

> "Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, *shall be allotted* by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year. . . ." (Emphasis added.)

By letter dated November 22, 1972, President Nixon informed Administrator Ruckelshaus:

> "*I direct that you not allot* among the States the maximum amounts provided by section 207 of the Federal Water Pollution Control Act Amendments of 1972. No more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted. . . ." (Emphasis added.) (*See* App. Br., Ct. of Appeals, *New York v. Fri*, Appendix pp. 15A-16A.)

The issue before this Court is whether the Administrator exceeded his authority in not allotting the funds authorized to be appropriated.

A. Action of Congress: A Sense of Commitment

Analysis of the legislative history of Title II of the FWPCA leads to the conclusion that Congress mandated the Administrator to allot among the states $5 billion for 1973 fiscal year, $6 billion for 1974 fiscal year, and $7 billion for 1975 fiscal year. The Administrator has some discretion at a later stage as to what is actually obligated, which in turn determines what would be appropriated, but not as to what part of the authorized funds may actually be allotted.

The report finally accepted by the Conference Committee and passed by Congress over the Presidential veto as previously discussed provides for a complicated funding procedure. Congress committed itself to providing 75% of the cost of constructing certain needed waste treatment management works. (§ 202.) The sums authorized to be appropriated are allotted amongst the states on the basis of need. (§ 205(a).) When the allotments are made the Administrator cannot possibly know how much or when the funds will later be appropriated. When the Administrator approves construction plans, a contractual obligation is created (§ 203), though the monies are expected to actually be spent over a seven-year period. Appropriations are then annually made by the Appropriations Committee based on the contractual obligations incurred by the Administrator. It is these appropriations which are not to exceed certain dollar amounts. The Administrator may decline to incur obligations on all the monies allotted to the states. Those funds which are not obligated within a year after the fiscal year in which they were allotted "shall be immediately reallotted by the Administrator". (§ 205(b)(1).) There is, therefore an important distinction between the procedures for fiscal flexibility provided for by Congress and the allotment reduction procedures directed by the President. Under the President's directive no funds will be carried over as allotted but not obligated. The President has cut off funds prior to the allotment stage, and thus substituted his judgment for that of Congress on what should be spent to clean our nation's waters over the next seven years.

In passing the FWPCA Congress was responding to an important problem discussed in the 1971 Subcom-

mittee Hearings on Water Pollution where there was much concern about the inadequacies of existing legislation:

> "At a bare minimum the credibility of the existing federal commitment must be reestablished by backing words of authorization with monies of appropriation. Whenever the nation seeks to encourage cities to plan and construct improvements which require many years to complete, the Congress must build reliability into its federal grant incentives. Major facilities cannot be stopped in midstream. A change in federal grant policy to establish a reliable commitment is vital but is not the only change that can and should be made in the federal legislative and regulatory approach to water pollution abatement." *Hearings on Water Pollution Control Legislation, U.S. Senate Committee on Public Works,* 92nd Cong., 1st Sess., pt. 1, at 521 (1971).

The general consensus during the first session of the 92nd Congress seemed to be that if the federal government was going to mandate state action to clean the nation's water, the federal government would have to bear part of the financial burden of accomplishing that task. States and local governments had strongly protested against the congressional imposition upon them of rigorous air quality standards under the Clean Air Act and Amendments of 1970 because the federal government did not at the same time provide funding to help the states and local governments meet those standards.

> "If Congress places upon State and communities the burden of carrying out this program, it should bind itself to pay the Federal share of the

> project costs. The authority for obligation will not bar the Committee on Appropriations from reviewing the manner in which the program is being carried forward." 2 U.S. Code Congressional and Administrative News, Pub. L. 92-500, p. 3702 (1972).

Discussing section 207 of the FWPCA (erroneously referred to below as subsection (b)), the Subcommittee on Air and Water Pollution ultimately concluded:

> "The language of subsection (b) [*sic*] of Section 207 provides that funds authorized for fiscal years 1973, 1974, and 1975, shall be available for obligation by contract upon their allocation to the States. The importance of assured Federal financial support to the achievement of the objectives of this title and to our national purpose of cleaning up polluted waterways cannot be overstated. The task is a massive one in terms of the work to be done and the funds to be expended." 2 U.S. Code Congressional and Administrative News, Pub. L. 92-500, p. 3701 (1972).

The subcommittee consistently voted against reducing the amount of the authorizations. The degree of the commitment to full funding felt by Congress is expressed in both Senate Reports and House Reports. In determining the intent of Congress in enacting a bill, it is particularly important to consider the views of the sponsors of the legislation. *First Nat. Bank v. Walker Bank*, 385 U.S. 252, 271 (1966); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 637 (1973). Senator Muskie[2] in his report stated:

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[2]Chairman, Senate Subcommittee on Air and Water reporting S 2770, floor manager for that bill and member of the Conference Committee.

"The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion *had to be committed* by the Federal Government in 75 percent grants to municipalities during fiscal years 1972-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. . . ." 118 Cong. Rec. S 16870 (daily ed. Oct. 4, 1972). (Emphasis added.)

"Mr. President, to achieve the deadlines we are talking about in this bill we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. And the conferees are convinced that the level of investment that is authorized is the minimum dose of medicine that will solve the problems we face." 118 Cong. Rec. S 16871 (daily ed. Oct. 4, 1972).

Though the financial commitment was great, it is important to remember that actual cash outlay in the three years for which appropriations were authorized would be relatively slight because of the lag time between approval of a project and actual expenditure for construction.

According to Congressman Harsha:

"[T]he first major impact of obligations from the $5 billion authorizations for the fiscal year ending June 30, 1973, is in fiscal year 1975. During that year the appropriations required for payment for obligations authorized by this legislation would

only be $2,450,000,000. The appropriations will be spread out over the period of construction of these waste treatment projects and would not be felt in any appreciable sum until fiscal year 1975, some 2 or 3 years hence.

"As a matter of fact, for fiscal year 1973 if all the money were obligated and placed under contract, there would only be $20 million needed to meet the obligations and in fiscal year 1974 there would only be the necessity of appropriating $250 million. Obviously there is not a severe impact on the economy for the next 3 years under this legislation." 118 Cong. Rec. H 9122 (daily ed. Oct. 4, 1972).

Congress was concerned about the inflationary effect, but concluded that the dangers of such an effect were outweighed by the interest in cleaning up our waters.

The "sense of Congress" (a term used in the Federal-Aid Highway Act) was expressed by Senator Bayh when he stated:

"The conferees agreed to accept the House passed authorizations for grants to the States for the construction of waste treatment plants, including sewage collection systems. This is construction which is absolutely essential if we are to make any meaningful progress toward the national goals established in the bill. The total authorization for this purpose is $18 billion over the 3 fiscal years ending in 1975. There is no doubt that this money is needed, for without substantial authorizations he [*sic*] bill would be little more than a series of empty promises. The amounts

allocated for grants for construction of treatment works will be distributed to the States on the basis of need, with the Federal share of construction costs being 75 percent. . . ." *Supra* at S 16892-93.

The intent of the House to make an $18 billion commitment was just as clear as it was in the Senate. Congressman Harsha,[3] in his report to the House, reminded his colleagues:

"You may recall that the bill that passed this body last March called for authorizing a little more than $24.6 billion, the Senate bill authorized $20 billion, and the administration requested $6 billion. The conferees have agreed on essentially the same figures as in the House bill, $24.6 billion for the period through fiscal 1975. A total of $18 billion of this sum is for construction grants, and breaks down not to exceed $5 billion for fiscal 1973, $6 billion for fiscal 1974, and $7 billion for fiscal 1975.

"Naturally, the large difference in what the administration asked, and what the conference bill provides, raises the question of why the substantial discrepancy?

"There is only one answer to that and it is that if we set out to do this job there is no way we can accomplish it without paying the price. If we want clean water, we have to pay for clean water. If we want the States and cities to move aggressively ahead in building waste treatment plants they

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[3]Ranking minority member of House Committee on Public Works, which reported House version, floor manager for that bill and member of Conference Committee.

must have Federal aid, and they must have confidence that Washington will continue to live up to its commitments." 118 Cong. Rec. H 9130 (daily ed. Oct. 4, 1972).

B. The President's Veto: A Different Policy

After unanimous passage by the Senate and with only 11 dissents in the House, the FWPCA went to the President. The legislation, with its appropriations which had been subject to such close scrutiny by the Congress, was rejected by the President as inflationary. In his veto message to Congress on October 17, the President said:

> "I am compelled to withhold my approval from S. 2770, the Federal Water Pollution Control Act Amendments of 1972—a bill whose laudable intent is outweighed by its unconscionable $24 billion price tag. My proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that same intent in a fiscally responsible manner. Unfortunately the Congress ignored other vital national concerns and broke the budget with this legislation."[4] Weekly Compilation of Presi-

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[4]It is interesting to note that according to former Administrator Ruckelshaus the difference between the amount which would have been authorized for appropriation in the Administration's bill submitted in 1971 (S 1013 by Senator Cooper) and that of the bill eventually passed, was not that substantial. In a letter by Ruckelshaus to President Nixon, urging the President to sign the bill, Ruckelshaus stated:

> "The total value of construction initiated in the near-term under the enrolled bill [S. 2770] is expected to correspond closely to the total value of construction that would have been initiated under the Administration bill. Under the Administration's proposal, communities were free to continue to initiate reimbursable projects, were not constricted by the $6 billion authorization, and could have substantially increased this amount. Reimbursable projects are

dential Documents, Vol. 8, No. 43, pp. 1531-32 (Oct. 23, 1972).

By exercising his constitutional prerogative of veto, the President fully expressed his disapproval of the congressional statement of policy as to how much money was needed to clean our waters.

C. Final Judgment of Congress: To Override the Veto

To the President's message both the House and the Senate, on October 17 and 18, responded by exercising their constitutional prerogative and overwhelmingly overriding his veto. In the discussion of the veto, Congress again expressed its conviction that the $18 billion was needed for allotment among the states to do the job. Senator Muskie said in response to Senator Scott's support of the President's concern about the budget

> ". . . But may I say to the Senator, when we pass a piece of legislation like this, with its requirements imposed on industry, with its requirements imposed on the States, with its requirements imposed on the local governments, the question that faces us then is, as we impose this commitment on them, what commitment are we prepared to accept on the part of the Federal Government?
>
> "This point was well debated in the Senate when we took up this bill. I made it clear, the

precluded under the enrolled bill and the $18 billion contract grant authority represents a ceiling, while the Administration's $6 billion proposal represented a floor. With the projected close correspondence in total near-term value of construction starts, the potential inflationary impact upon the entire construction sector would be minimized." 118 Cong. Rec. S 18546 (daily ed. Oct. 17, 1972).

committee made it clear, that what we are asking of the Congress was a commitment that these people in other levels of government and the private sector could rely upon. Of course there is a commitment. The President 3 years ago, in his state of the Union message, said he had preempted the environmental issue and that he was making a commitment.

". . . The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation, and specifically studying how much money would be necessary to achieve the objective and goals of the act, as set forth in section 101(a)." 118 Cong. Rec. S 18548 (daily ed. Oct. 17, 1972).

Congressman Harsha likewise responded to the President's veto:

"To those who say that we cannot afford to start now on the restoration of our waters, on the scale that Congress believes is essential, I say that we dare not postpone this undertaking. Every day of inaction most certainly will add to the ultimate cost; another year of inaction may well destroy all hope of saving our environment.

". . . .

"Mr. Speaker, there is another point which I must raise. We have known all along that it would take a massive amount of money and time to reclaim and to protect our precious water resources. But, we dare not measure the cost of this water bill merely in terms of dollars alone. We cannot measure the wealth of our great natural resources in dollars alone—and if we wait

too long, all the dollars on earth won't buy back what we've lost. Under these circumstances, I am firmly convinced that the price of killing this water bill—of sustaining this Presidential veto—is far, far too costly.

". . . .

"Furthermore, the President maintained that a vote to override the veto of the Water Pollution Control Act Amendments of 1972 was a vote to increase the likelihood of higher taxes. So be it, the public is prepared to pay for it. To say we can't afford this sum of money is to say we can't afford to support life on earth.

". . . .

"This is not 'extreme and needless overspending'—to use Mr. Nixon's language. The moneys authorized are based on estimates made by his own administration. Furthermore, the bill sets up a new system of user charges, by which industrial users would return their share of operating and maintenance costs of waste treatment plants—an estimated $4.5 billion—to the Federal Treasury.

"Our economy can, and must, absorb the costs of pollution control. A March 1972 report of the President's Council on Environmental Quality on 'The Economic Impact of Pollution Control' notes that no real attempt has yet been made to quantify the benefits of a cleaner environment and that studies tend consequently to overstate the net costs to society.

"Mr. Speaker, this is perhaps the most important environmental legislation the Congress has yet enacted. The question is not, 'Can we afford to spend $18 billion over the next 3 years for

waste treatment plants?' but 'Can we afford not to?' . . ." 118 Cong. Rec. H 10267-68 (daily ed. Oct. 18, 1972).

The statements of Congressmen quoted above are but some of the plentiful language expressing Congress' intention that the full $18 billion be spent for water pollution control.

D. The Distinction Between Discretion in Allotment and in Obligation

Even more important in a suit on reduction of allotments than the general intent that the funds be spent is the evidence that both Congress and the President understood that sections 205(a) and 207 built in flexibility in the contractual obligation stage which effects *when* the money is spent, but not in the allotment stage, which determines whether the funds ultimately are spent. That the President was aware of some flexibility in spending is expressed in his veto message of October 17:

> "Even if this bill is rammed into law over the better judgment of the Executive—even if the Congress defaults its obligation to the taxpayers—I shall not default mine. Certain provisions of S. 2770 confer a measure of spending discretion and flexibility upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible." Weekly Compilation of Presidential Documents, Vol. 8 No. 43, p. 1532 (Oct. 23, 1972).

In his report to the Senate on the conference bill, Senator Muskie explained the purpose behind the language of sections 205(a) and 207:

"In our last conference, the able and distinguished ranking minority member of the House Committee on Public Works offered two amendments which he indicated would reduce opposition to the bill from the White House and the Office of Management and Budget. These two amendments were accepted by your conferees and by other House conferees in order to remove the question of a veto on the basis of the money authorized by the legislation.

"Under the amendments proposed by Congressman WILLIAM HARSHA and others, the authorizations for obligational authority are 'not to exceed' $18 billion over the next 3 years. Also, 'all' sums authorized to be obligated need not be committed, *though they must be allocated.*[5] These two provisions were suggested to give the administration some flexibility concerning the obligation of construction grant funds.

"The conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the act. At the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the administration to refuse to enter into contracts for construction." (Emphasis added.) 118 Cong. Rec. S 16871 (daily ed. Oct. 4, 1972).

[5]Allocated rather than allotted was the term which had been used in the Senate version of the bill.

Congressman Harsha made the same point to the House when they voted to override the President's veto:

> "Furthermore, Mr. Speaker, we have emphasized over and over again that if Federal spending must be curtailed, and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.
>
> "I want to point out that the elimination of the word 'all' before the word 'sums' in section 205 (a) and insertion of the phrase 'not to exceed' in section 207 was intended to emphasize the President's flexibility *to control the rate of spending.*
>
> ". . . .
>
> "Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the *Executive can control the rate* expenditures." (Emphasis added.) 118 Cong. Rec. H 10268 (daily ed. Oct. 18, 1972).

The legislative history of sections 205(a) and 207 clearly indicates an intent to allow discretion in the rate of spending; making allotments of funds to the states, however, is solely a ministerial act.

The importance of the distinction between flexibility in the obligation stage and in the allotment stage was properly noted by Judge Gasch in *City of New York v. Ruckelshaus:*

> "Another feature of the Act which is of some importance in the resolution of issues before the Court is the reallotment provision in § 205(b)(1) of the Act. Once allotted to a State, sums are available for obligation for approved projects there 'for a period of one year after the close of the fiscal year for which such sums are authorized.' If for any reason the sums allotted are not fully obligated within that period, they are to be reallotted 'generally on the basis of the ratio used in making the last allotment of sums under this section.' Such reallotment sums remain available for obligation and are added to the State's allotment for the next fiscal year. Any sums authorized but not allotted at the appropriate time are lost to the State under the provisions of this Act. Thus, by refusing to allot the full sums authorized, the Administrator controls the absolute amount (as opposed to the rate) of spending without regard to the standards set forth in, e.g., § 204, for determining whether sums should be obligated." *New York City v. Ruckelshaus*, Appendix p. 62A.

Congress gave the administration flexibility in spending but did not intend to allow the Act to be gutted by making less than the allotments provided for by the Act. To accept the argument of petitioner, the Administrator would allow the President to substitute his judgment for that of Congress.

District Court Judge Merhege in *Campaign Clean Water* came to the conclusion that the Administrator had discretion to reduce allotment of funds but had

abused that discretion.[6] In coming to the conclusion on the discretionary aspect of the funding procedure, Judge Merhige relied on much the same language of legislative history by Congressman Harsha and Senator Muskie concerning deletion of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207, which we contend were designed to give flexibility in the obligation but not the allotment stage.

Judge Merhege stated:

> "Judge Gasch in City of New York concluded from this language and other by-play that, in accordance with Senator Muskie's views, the discretionary elements incorporated into the Act and referred to by the various legislators were meant to apply to executive control over the 'rate of spending,' but that the rate of spending was to be monitored only at the obligation stage and not by the withholding of allotments.
>
> "This Court respectfully declines to adopt this interpretation, primarily because it appears to deemphasize the syntactical history of Section 205 which shows the purposeful removal of the word 'all' from § 205. While the legislative debates lend strength to Judge Gasch's conclusion, the Court, the plaintiff, and, to a limited extent, the defendant, are in agreement that legislative history is in

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[6]On appeal the Court of Appeals noted that plaintiff "concedes that Congress intended to give the executive certain discretion in making allotments under Section 205." (Appendix p. 39A.) Plaintiff apparently made much the same concession in the trial court. (Appendix p. 96A.) It is that concession which is erroneous and which led that court astray. No such concession was made in *Train v. New York, supra*, enabling the court in that case properly to decide the issue.

> the main unclear, politically charged, and in the Court's view, to some degree based upon suspect constitutional interpretation of the powers of the President. In this context the syntactical history must be given great weight. See generally Gilbert v. General Electric, 347 F. Supp. 1058 (E.D. Va. 1972). The Court accordingly concludes that the Congress did intend for the executive branch to exercise some discretion with respect to allotments. Plaintiff, in fact, does not seriously dispute this conclusion, but contends that 'the Congress could not have intended to give the Administrator the discretion to gut the Act.' This latter contention merits close scrutiny." Appendix at 95A-96A (footnote omitted).

As previously noted, part of the problem in relying upon *Campaign Clean Water* is the acquiescences of plaintiff in the core concept that reduction of allotments was discretionary. Nonetheless, deletion of the word "all" from section 205(a) does raise some question as to the meaning of section 205(a) when read with section 207. The Court of Appeals for the District of Columbia Circuit in *City of New York v. Train* more properly dealt with the meaning of those amendments.

> "We now turn to the analysis of §§ 205(a) and 207, particularly with regard to the effect of the Harsha Amendments. As we indicated earlier, it is important to keep in mind the distinct stages involved in the contract-grant mechanism. Appellant-Administrator argues, primarily from the Harsha Amendments, that the Act permits discretion at the *allotment* phase. Appellee-City counters that while the Administrator might control the timing

of future spending through delay of *obligation*, he must fully allot. We agree with Appellee because, after careful consideration of the relevant history, we find it clear that the Congressional intent, both before and after the Harsha Amendments, was to make allotment mandatory.

"Section 205(a), by its terms, supports the Appellee. It is mandatory in tone: 'Sums authorized to be appropriated pursuant to section 207 for each fiscal year . . . *shall be allotted* by the Administrator. . . .' (Emphasis added.)

"The Appellant argues that the Harsha Amendments, by adding 'not to exceed' in § 207, manifest an intent to make the *allotment* (under § 205) discretionary. However, the imposition of a ceiling on authorized appropriations is not inconsistent with the Appellees' position concerning mandatory allotment. Logically, it could be interpeted to mean that the amount obligated (later appropriated and expended) in any fiscal year *may* be less than the maximum amount authorized. We concede that the elimination of the word 'all' from § 205(a) is a source of confusion. At least one court[18] has chosen to rely entirely upon this syntactical change, although there is no precise explanation of its meaning. We consider it more useful to examine the statements of sponsors purporting to explain the intended effect of the Harsha Amendments; we find that allotment remained mandatory." *City of New York v. Train*, Combined Appendix pp. 19A-20A (emphasis by the court).

"[18]Campaign Clean Water v. Ruckelshaus, Civil No. 18-73-R (E.D. Va. filed June 5, 1973) slip op. at 14. [Court's footnote.]

III

The President Has Only Such Powers to Refuse to Spend Funds Authorized by Congress as May Be Found or Implied by Legislation

In the many congressional hearings on impoundment of funds by the President, Congressmen have referred to the refusal to allot funds under the FWPCA as an impoundment issue. As previously discussed (*supra* pp. 25-33), we see a very important distinction. Refusal to allot funds authorized to be appropriated has the effect of cutting off a federal financial commitment which Congress has made, while impoundment may simply delay the spending.

Discussions of impoundment nonetheless may be helpful in resolving this issue. Whatever might be said of the impropriety of impoundment should be amplified for the facts before this Court. If the President lacks authority to delay expenditure of funds appropriated by Congress, how much more surely must he lack the power to completely block use of funds.

Though Presidents have been impounding funds since Jefferson, the practice has never been so extensively employed as by President Nixon. Historically, the power to impound has been treated as a limited one. Traditionally, impoundments have fallen into one of three categories:

> "(1) [F]unds were impounded solely because they were no longer necessary for or appropriate to the achievement of the ends for which they had been made available; (2) the impoundment was arguably justifiable as an exercise of the President's authority as Commander in Chief of the Armed Forces, either because the funds with-

held had been made available for defense programs or because spending of the funds would hinder a war effort; or (3) Congress had authorized the President to impound if necessary as a means of reducing government spending." *Impoundment of Funds,* 86 Harv. L. Rev. 1505, 1508.

Although arguably impoundment at the obligation stage may fall into the third category, a reduction of allotment does not fall into any category and has no historical support. An excellent summary of the past use of the impoundment power may be found in the *Hearings on H.R. 5193 and Related Bills Before the Subcomm. on Rules,* 93rd Cong., 1st Sess., pts. 1, 2 at 88, *et seq.,* L.C. 73-602108 (1973).

The exercise of the power of impoundment by President Nixon has gone far beyond the practice accepted in the past. The result is a "constitutional crisis" which ultimately must be resolved in the courts. Congress' own short-term response, after much debate, has been to pass an anti-impoundment bill, HR 8480 (which requires the President to report all impoundments). The harm has already been done however to the FWPCA and can only be rectified by judicial decision.

In the Hearings on Impoundment,[7] Congressman Evans of Colorado expressed a sentiment which was shared by many of his colleagues:

"The current situation is intolerable. The President impounds with impunity and we in Congress search for ways to force the President to carry

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[7] *Hearings on H.R. 5193 and Related Bills Before the Subcomm. on Rules,* 93rd Cong., 1st Sess. (1973).

out his constitutional duties to execute the laws of the United States. . . .

"An appropriation bill, if passed and signed by the President, is a law. The Constitution states that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' (Art. I, sec. 1.) The Constitution further states that, 'No money shall be drawn from the Treasury, *but* in consequence of appropriations made by law.' (Art. I, sec. 9; emphasis added).

"Consequently, the starting point of any discussion is that the power to spend money—and surely, by any stretch of logic, the authority not to spend money—is vested originally in the Congress. Any delegation of that authority must come from the Congress itself. . . .

"Second, the powers of the President, while vast, are not inherently broad in themselves. Congress has delegated an enormous amount of authority to the President over the years. But the theory expressed so many times by the Nixon administration, that somehow the President has broad 'inherent' authority in many different areas, surely is wrong. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court emphatically ruled that President Truman lacked the 'inherent' constitutional authority to seize the steel industry. . . .

"In other words, the President, as well as the Congress, must be guided by the fundamental constitutional principle that the Federal Government is a government of limited, enumerated powers.

"Now, of course, the Anti-Deficiency Act allows the President to impound funds under very specific circumstances, 'to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.' (31 U.S.C. 665(c)(2).) However, these are carefully circumscribed circumstances which do not spell out a broad, inherent authority to impound. This is the opinion of the Comptroller General of the United States, the Honorable Elmer B. Staats, as stated in recent testimony before Senator Ervin's subcommittee. In addition, of course, when Justice Rehnquist was Assistant Attorney General in 1969, he wrote a memorandum to a White House official that the President lacked the inherent constitutional authority to impound. Now, the Nixon Administration states that Mr. Rehnquist was wrong. The question is up to the Supreme Court to decide, but surely it should not be the Congress, on its considered reaction, which concedes an iota of such authority." *Hearings on H.R. 5193 and Related Bills Before the Subcommittee on Rules, House of Representatives*, 93rd Cong., 1st Sess. (1973).

Congressmen have recognized that the question of impoundment is one properly to be decided by the Supreme Court. This case presents Your Honors with an opportunity to resolve an important issue.

We turn to the opinion by Justice Rehnquist mentioned by Congressman Evans. That opinion on

the question of the President's authority to impound funds was written as an opinion memorandum in 1969 by then Assistant Attorney General William Rehnquist. 116 Cong. Rec. S 158 (daily ed. Jan. 20, 1970). The legislation with which the opinion dealt appropriated funds for assistance to federally impacted schools, but the rationale would appear to be equally applicable to the FWPCA. The opinion emphasized the fact that the impoundment would result in:

> ". . . permanent loss to recipient school districts of the funds in question and defeat of the Congressional intent that the operations of these districts be funded at a particular level for the fiscal year." 116 Cong. Rec. S 159 (daily ed. Jan. 20, 1970).

A similar loss of funds will result if the reduction of allotments is not rejected under the FWPCA.

Some of the same arguments raised in support of President Nixon's actions were disposed of by William Rehnquist:

> "It has been suggested that the President's duty to 'take care that the laws be faithfully executed' might justify his refusal to spend, in the interest of preserving the fiscal integrity of the Government or the stability of the economy. This argument carries weight in a situation in which the President is faced with conflicting statutory demands, as, for example, where to comply with a direction to spend might result in exceeding the debt limit or a limit imposed on total obligations or expenditures. See, *e.g.*, P.L. 91-47, title IV. But it appears to us that the conflict must be real and imminent for this argument to have validity; it would

> not be enough that the President disagreed with spending priorities established by Congress. . . ." 116 Cong. Rec. S 160 (daily ed. Jan. 20, 1970).

In the case of reduction of allotments under FWPCA, President Nixon has let it be well known that he disagrees with Congress' spending priorities, but there are no conflicting statutory demands to justify his directive to the Administrator to impound funds prior to allotment.

An unpublished opinion letter of May 27, 1937, by Attorney General Cummings to the President is cited by the Rehnquist opinion. The Cummings opinion held that the President could not legally require the heads of departments and agencies to withhold expenditures from congressional appropriations.

William Rehnquist also cites the United States Supreme Court case of *Kendall v. United States*, 37 U.S. 524 (1838). That case dealt with an Act of Congress directing the Treasury to settle an account under a contract for mail service. When the Postmaster General refused to credit part of the funds, a writ of mandate was held proper to compel the expenditure. It is considered prominent among the cases rejecting the constitutionality of impoundment by the President without authorization from Congress.

Congressman Evans, in addition to referring to the Rehnquist opinion, mentioned the Anti-Deficiency Act as providing for Presidential impoundment of funds "under very specific circumstances."

In concluding that the Anti-Deficiency Act would not allow the Secretary of Transportation to withhold the authority to obligate apportioned funds under the

Federal-Aid Highway Act, the Eighth Circuit provided a good summary of the role of the Anti-Deficiency Act.

> "Although the applicability of the Anti-Deficiency Act, 34 Stat. 49, as amended, 64 Stat. 765, 31 U.S.C. § 665(c), was not argued on this appeal, the conclusion we reach is not at variance with the provisions of that Act. Section 665(c)(2) allows the Bureau of the Budget (now OMB), when apportioning appropriation funds, to set up reserves (i.e., withhold the funds) in order 'to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.' However, the Act goes on to point out that the reserves may only be established when the funds '*will not be required to carry out the purposes of the appropriation concerned . . . .*' (Emphasis ours.) The legislative history is emphatic in noting that this power to withhold funds cannot be used if it would jeopardize the policy of the statute.
>
> " 'It is perfectly justifiable and proper for all possible economies to be effected and savings to be made, *but there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds.* If this principle of thwarting the will of Congress by the impounding of funds should be accepted as correct, then Congress would be totally incapable of carrying out its constitutional mandate of providing for the defense of the

> Nation.' (Emphasis ours.) H.R.Rep. No. 1797, 81st Cong., 2d Sess. 311 (1950).
>
> It is thus apparent that any withholding in order to 'effect savings' or due to 'subsequent events,' etc., must be considered in context of not violating the purposes and objectives of the particular appropriation statute. Such purposes and objectives are necessarily violated when one charged with implementing the statute acts beyond his delegated authority." *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1118 (8th Cir. 1973).

The Eighth Circuit's reading of the Anti-Deficiency Act is perfectly consistent with that found in *Impoundment of Funds*, 86 Harv. L. Rev. 1505, at 1528:

> "The Antideficiency Act of 1950 was passed partly in order to limit executive impoundments to those undertaken only to further the purposes of the particular program involved. . . ." (Footnotes omitted.)

Further support for this reading of the Anti-Deficiency Act is found in *Presidential Impounding of Funds: The Judicial Response*, 40 U. Chi. L. Rev. 328, 337-38:

> "The Anti-Deficiency Act cannot, therefore, be taken as granting a general power to impound. On the contrary, it limits the power to impound to the achievement of efficiency and economy in carrying out the spending programs Congress has authorized, without in any way impairing the achievement of the programs' goals. Indeed, the Supreme Court's decision in the Steel Seizure

> Case suggests that, since Congress has defined the purposes for which impounding is permissible, any impounding not authorized by the Act or by a specific appropriations statute is illegal." (Footnotes omitted.)

The requirements of the Anti-Deficiency Act should not be used as an excuse for allowing the President to circumvent the clear congressional policy found in the FWPCA.

IV

The Position of Respondents in This Case Is Supported by the Recent Decision in Missouri v. Volpe

Since the reduction of allotments under the FWPCA, a significant decision concerning the legality of impoundment has been decided by the Eighth Circuit Court of Appeals. On April 2, 1973 in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), Judges Lay and Heaney concluded that the Federal-Aid Highway Act does not expressly or implicitly authorize the Secretary of Transportation to withhold the authority to obligate apportioned funds because of the status of the economy and the need to control inflation.

The funding procedures under the FWPCA are largely patterned after the Federal-Aid Highway Act, except that greater flexibility in the obligation phase was built into the FWPCA by use of the "not to exceed" language in section 205(a). Although the action challenged in *Missouri v. Volpe* was at the obligating

stage rather than the allotment stage,[8] the opinion has substantial value here as a rejection of the proposition that the President has inherent power to reduce expenditure of funds authorized by Congress.

One argument presented by the government was that the states had no vested rights in the funds until the Secretary approved a specific project. To that the court replied that, assuming, *arguendo*, there was no vested right until approval, that does not mean the Secretary has discretion to withhold approval for reasons not contemplated in the Act.

Another argument made by the government which the court found unavailing was the contention that appropriation Acts are permissive in nature and do not provide specific mandate that funds authorized to be appropriated must be expended. The court responded:

> ". . . For although a general appropriation act may be viewed as not providing a specific mandate to expend *all* of the funds appropriated, this does not *a fortiori* endow the Secretary with the authority to use unfettered discretion as to when and how the monies may be used. The Act circumscribes that discretion and only an analysis of of the statute itself can dictate the latitude of the questioned discretion. Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 322 . . .

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[8]As for the reduced allotments, former Federal Highway Administrator, F. C. Turner, had observed: "There is absolutely no discretion of any kind in our office with respect to how much any State gets in any of these categories of funds [pursuant to the formula]. The apportionment is specified in the law and we distribute it right to the dollar." Testimony reported in *Hearings on Executive Impoundment of Appropriated Funds Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, 92nd Cong., 1st Sess. at 80 (1971).

(1961); Federal Trade Commission v. National Lead Co., 352 U.S. 419, 428 . . . (1957); Stark v. Wickard, 321 U.S. 288, 309 . . . (1944); Pentheny, Ltd. v. Government of the Virgin Islands, 360 F.2d 786, 790 (3 Cir. 1966)." *State Highway Commission of Missouri v. Volpe, supra,* 479 F.2d at 1109 (emphasis by the court).

V

Even Assuming Sections 205(a) and 207 Gave the Administrator Discretion to Limit Allotments, He Abused That Discretion by Allotting Only $5 Billion of the $11 Billion Authorized for Appropriation for 1972 and 1973

It is our contention that there is no discretion delegated as to the allotment stage though there is flexibility as to the rate of spending. The United States District Court, Eastern District of Virginia concluded that the Administrator has discretion to reduce allotments (as conceded by plaintiffs in that case) under sections 205 (a) and 207 *but* that the allotment of only $5 billion constitutes a flagrant abuse of that discretion and violates the Act. *Campaign Clean Water v. Ruckelshaus.* (Joint Appendix F.) When the matter was appealed, the Fourth Circuit concurred with the District Court that whatever discretion the executive might have was limited and the exercise of that discretion was reviewable, but concluded the reduction of allotment did not, on its face and without any other evidentiary support, require a finding of executive nullification of the purposes of the Act. In arriving at its decision to remand with directions to consider evidence on whether the reduction was violative of the spirit, intent, and letter of the Act, the Fourth Circuit con-

sidered a number of factors. One of the factors was the Administrator's contention before the Senate ad hoc Subcommittee on Impoundment of Funds on February 6, 1973, that the allotments were arrived at on the basis of an administrative judgment that greater authorizations could not be spent in a wise or expeditious way. Not only does this decision conflict with the congressional judgment as to how much money was needed to accomplish the goals of the Act, but such a statement completely overlooks the mechanism for carrying over allotted but unused funds. This latter consideration is equally applicable to the argument accepted by the court that no qualified project in Virginia had been denied contract authorization. It is impossible to foresee what contracts might be supported in the future by allotments which are carried over. We hasten to add that if the United States Supreme Court evaluates the question whether there was an abuse of discretion, the fate of more states than Virginia is involved. As the Fourth Circuit itself noted, other states have proven projects have qualified for grants but have been denied construction approval because of the paucity of funds allotted, *cf. State of Minnesota v. EPA, supra.*

Finally, the Fourth Circuit emphasized that the Administrator claims the power to increase allotments during a fiscal year and has indicated he would give consideration to doing so if the 1973 and 1974 allotments were inadequate. Though in the abstract the Administrator may have such a power, realistically it is the President who has ordered reduction of allotments, so the Administrator's state of mind is of little consequence. Furthermore, an increase in allotments was never made

in 1973, so unless this Court rules in favor of requiring full allotments, that money is forever lost.

Although we contend that the allotments are mandatory rather than discretionary, if this Court should hold them discretionary, we believe that the Administrator's allotment of only 55% of the funds is *per se* an abuse of discretion.

Both courts in the decisions before Your Honors examined the legislative history of the provisions for grants for waste treatment plants and found a strong congressional financial commitment to construction of waste treatment plants. That commitment would be contravened and the purpose of the legislation frustrated by a reduction of 45% of the allotment funds. The President should not be allowed to do by extraconstitutional means what he failed to accomplish when he vetoed the FWPCA and was overruled by Congress. If this Court should conclude that the allotments are not mandatory under sections 205(a) and 207, the action of the Administrator should still be held null and void as an abuse of discretion.

VI

The Doctrine of Separation of Powers Prohibits the Type of Executive Assumption of Congressional Function Accomplished by Refusal to Comply With the Allotment Procedures of the FWPCA

Rarely during this country's history has the concern over assumption of congressional power by the President been as great as it is today. Many Congressmen feel that the doctrine of separation of powers will not remain viable unless the impoundment powers of the President are checked. Twenty-nine Congressmen sub-

mitted an "amicus curiae brief" opposing the Secretary of Transportation's policy of reducing expenditures in the case of *Missouri v. Volpe*.[9] That brief stated that the Administrator's impoundment practices are "contemptuous of the role of Congress in our tripartite system." Congressional Quarterly Weekly Report, Vol. 31, No. 14, p. 788 (April 7, 1973).

All legislative powers were bestowed by our Constitution (art. I, § 1) upon the Congress of the United States. Article I, section 9 of the Constitution delegates all authority for appropriations to the Congress. Executive power is vested in the President by article II, section 1.

Although the Constitution does not expressly prohibit one branch from exercising the powers of another,

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[9]Senator Samuel J. Ervin, Jr., Chairman, Government Operations Committee; Senator James O. Eastland, President Pro Tempore, Chairman, Judiciary Committee; Senator Michael J. Mansfield, Majority Leader; Senator Robert C. Byrd, Assistant Majority Leader; Senator Jennings Randolph, Chairman, Public Works Committee; Senator John L. McClellan, Chairman, Appropriations Committee; Senator Howard W. Cannon, Chairman, Aeronautical & Space Sciences Committee; Senator Thomas F. Eagleton, Chairman, District of Columbia Committee; Senator J. W. Fulbright, Chairman, Foreign Relations Committee; Senator Vance Hartke, Chairman, Veterans' Affairs Committee; Senator Henry M. Jackson, Chairman, Interior & Insular Affairs Committee; Senator Gale W. McGee, Chairman, Post Office & Civil Service Committee; Senator Warren G. Magnuson, Chairman, Commerce Committee; Senator Lee Metcalf, Chairman, Joint Committee on Congressional Organization; Senator John Sparkman, Chairman, Banking, Housing & Urban Affairs Committee; Senator Stuart Symington; Senator Harrison A. Williams, Jr., Chairman, Labor & Public Welfare Committee; Representative Morris K. Udall; Senator John A. Stennis, Chairman, Armed Services Committee; Senator Herman E. Talmadge, Chairman, Agriculture & Forestry Committee; Senator Frank E. Moss, Chairman, Aeronautical & Space Sciences Committee; Senator Hubert H. Humphrey; Senator John V. Tunney; Representative William V. Alexander, Jr.; Representative Robert F. Drinan; Representative J. J. Pickle; Representative Benjamin Rosenthal.

it has been said that the doctrine of separation of powers is fundamental to our form of government. *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582 (1949). The United States Supreme Court has repeatedly referred to the doctrine as one of the chief merits of our system of a written constitution. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *O'Donoghue v. United States*, 289 U.S. 516 (1933); *Kilbourn v. Thompson*, 103 U.S. 168 (1880). Although there is bound to be a certain area of concurrent jurisdiction, the continued integrity of our system may depend upon the mutual independence of the Legislature, the Executive and the Judiciary. *McCray v. United States*, 195 U.S. 27 (1903).

It is true that the President has the duty to "take care that the laws be faithfully executed." However, as the Fourth Circuit Court of Appeals stated in *Campaign Clean Water:*

> "The power to spend rests primarily with Congress under the Constitution; the executive, on the other hand, has the constitutional duty to execute the law in accordance with the legislative purpose so expressed. When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review. . . ." Appendix pp. 45A, 46A, 47A (footnotes omitted).

Should this Court conclude that the FWPCA did not specifically require all funds to be allotted, we would urge Your Honors to recognize the validity of the position summarized in *Presidential Impounding of Funds: The Judicial Response, supra,* pp. 355-56, where it is stated:

> "There is no basis for a general impounding power, by express terms or by implication, either in the Constitution or in any general statute. Authorization and appropriations statutes only rarely allow the president entirely to terminate a program by impounding. The president may end a program only be [*sic*] vetoing it in accordance with the Constitution. He has no authority to use impounding as an absolute, retroactive, or item veto. Congress should be presumed to have passed each appropriation statute with the intent that the monies be spent; in the absence of explicit statutory language to the contrary, the president should be deemed bound by his oath of office to carry out Congress's purpose. In most cases, the courts have power to grant persons who have been injured by unlawful impounding a legal remedy. This power should be exercised to insure that persons receive benefits that Congress intended them to have, to preserve the constitutional separation of powers, and to forestall a serious constitutional crisis." (Footnote omitted.)

As early as 1838 the Supreme Court indicated that the duty to execute the laws does not include the right to denegrate the law. *Kendall v. United States,* 37 U.S. 524 (1838). Application of the reasoning of the *Kendall* case recently resulted in a District Court's enjoin-

ing the Office of Economic Opportunity from terminating the funding for a program. Relying on *Kendall* the court rejected the argument that the President has discretionary power to refuse to spend certain funds. *Local 2677, American Fed. of Gov. Emp. v. Phillips*, 358 F. Supp. 60 (D. D.C. 1973).

President Nixon did not agree with the policy decision made by Congress when it authorized $18 billion for appropriation for waste treatment plants. He accordingly exercised his constitutional prerogative to veto the legislation, and Congress in turn exercised its constitutional right, granted in article I, section 7, to override that veto. The legislative, not the executive, branch thus may have the final say as to what becomes law. To now allow the President to accomplish by reducing allotments what he could not by veto should be tantamount to giving the President an item veto and would violate the doctrine of separation of powers.

Conclusion

The issue before this Court is clear. Having failed to reverse the policy decision of Congress by exercise of his constitutional power of veto, will the President now succeed by extra-constitutional measures to frustrate the intent of Congress and lessen the national commitment to clean our waters?

We contend that the legislative history of the FWPCA, and of sections 205(a) and 207 in particular, makes clear the congressional commitment to spend the $18 billion deemed necessary as the federal share for construction of waste treatment plants. Allotment by the Administrator of funds authorized to be appropriated is a ministerial act, though some flexibility

in spending is built into the Act. Mandamus is a proper remedy to protect the interests of the states which must build waste treatment plants to comply with the requirements of the Act.

This Court should not abdicate its responsibility to act to maintain the constitutional doctrine of separation of powers. This Court should affirm the judgment of the Court of Appeals for the District of Columbia and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

ROBERT H. O'BRIEN,
Senior Assistant Attorney General,

NICHOLAS C. YOST,
Deputy Attorney General,

Attorneys for People of the State of California as Amicus Curiae in Support of Respondents.

Of Counsel:
JAN E. CHATTEN.